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IN THE

Supreme Court of the United States

October Term 1968
No. 1259

JOSEPH SICA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI.

(Appendix A.)
(Appendix B.)

F. FILMORE JAFFE,
6380 Wilshire Boulevard,
Suite 900,
Los Angeles, Calif. 90048,
Attorney for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 685-9790

APPENDIX A.

Order Denying Defendant's Motion to Correct Sentence.

United States District Court, Southern District of California, Central District.

Joseph Sica, Petitioner, v. United States of America, Respondent. No. 27,973—Geo. Boldt-CD.

Filed: May 1, 1968.

The motion of defendant Joseph Sica to correct the criminal sentence imposed upon him in the above cause on December 2, 1961, and the memoranda in support and opposition thereto, have been fully reviewed and considered.

The language of the Court at the time of the sentence on which defendant Sica relies is not reasonably, certainly not necessarily, susceptible to the interpretation defendant seeks to have applied thereto. It is hereby certified the Court has not at any time intended such interpretation. In fact, full allowance was made for all time in custody served by defendant Sica prior to sentencing in fixing the further time to be served by defendant at 20 years as provided in the written sentence and judgment as entered. The Court considers and finds this clearly shown by the sentencing language referred to.

The Court finding no error or mistake in the sentence and judgment imposed on defendant Sica, his motion for correction of the sentence and judgment is without merit and should be and hereby is denied.

IT IS SO ORDERED this 29th day of April, 1968.

GEORGE BOLDT
United States District Judge

APPENDIX B.

Office of the Clerk, U. S. Court of Appeals, P. O. Box 547, San Francisco, California 94101.

March 5, 1969.

Messrs. Jaffe, Osterman & Soll, Attorneys at Law, 6380 Wilshire Blvd., Suite 900, Los Angeles, Calif. 90048.

Dear Sir:

The Petition for a Rehearing heretofore filed in case No. 23031—Joseph Sica v. USA was this day denied.

Pursuant to Rule 41(a), and unless stayed by the order of the Court, a certified copy of the judgment of this Court under said Rule will be due to issue on the expiration of seven (7) days from the date hereof.

Sincerely,

Wm. B. Luck,
Clerk.

Opinion of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals, for the Ninth Circuit.

Filed Jan. 28, 1969.

Joseph Sica, Appellant, vs. United States of America, Appellee. No. 23,031.

On Appeal from the United States District Court for the Central District of California.

Before: BARNES, HAMLIN and ELY, Circuit Judges.

PER CURIAM:

The judgment is affirmed. *Cf. Aldridge v. United States,* ..... F.2d ..... (No. 22,841, 9th Cir., decided January 17, 1960).

Stanley N. Barnes,
O. D. Hamlin,
Walter Ely
United States Circuit Judges

BRIEF FOR THE UNITED STATES IN OPPOSITION

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1259

JOSEPH SICA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In 1961, petitioner was convicted in the United States District Court for the Central District of California on three counts of an indictment which charged interstate conspiracy to extort and coerce (Counts 1 and 4; 18 U.S.C. 1951), and conspiracy to communicate threats by means of interstate commerce (Count 5). On December 2, 1961, he was sentenced to twenty years' imprisonment and a fine on Count 1, and to five years' imprisonment on Counts 4 and 5, to be served concurrently with the sentence imposed on Count 1 (Pet. 3–4; 3 R. 3045, 3047).[1] Petitioner's offenses were in further-

[1] "R." refers to the three-volume court of appeals record on file with the clerk of this Court.

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ance of an effort to control boxing throughout the United States. *Carbo* v. *United States,* 314 F. 2d 718 (C.A. 9), certiorari denied, 377 U.S. 953. The Count 5 conviction was set aside on appeal, the court of appeals noting that such modification had no effect on the sentence in view of the concurrent sentences on Count 4 and Count 1 (314 F. 2d at 733–734).

In 1968, petitioner, pursuant to Rule 35, F.R. Cr. P., sought correction of his 1961 sentence. He claimed that the court in 1961 intended to deduct one year from the announced sentence in order to give credit for his pre-sentence custody (1 R. 10), and that by imposing the maximum authorized sentence of imprisonment under Count 1 (twenty years) had failed to do so (1 R. 11–12). In denying relief, the sentencing judge certified that he had not at any time intended any such interpretation (Pet. App. 2; 1 R. 2).

On January 17, 1969, the court of appeals affirmed the denial of the Rule 35 request for correction of sentence (Pet. App. 4), and on March 5, 1969, a petition for rehearing was denied (Pet. App. 3). The petition for a writ of certiorari, which was filed on April 14, 1969, is out of time under Rule 22(2) of the Rules of this Court. *Heflin* v. *United States,* 358 U.S. 415, 418, n. 7. In any event, it is not meritorious.

When petitioner was sentenced, 18 U.S.C. 3568 provided that for those not subject to minimum mandatory sentence, the term of commitment should run from the date of the commencement of the service of the sentence. By the Bail Reform Act of 1966 (P.L. 89–465, Sec. 4, 80 Stat. 214), 18 U.S.C. 3568

was amended so as to provide all defendants with credit for time spent in pre-sentence confinement for want of bail, but the statute was expressly made prospective in application. Congress undoubtedly assumed that, as to prior sentences, the time spent in custody before trial would have been considered by the court in fixing the original sentence. In *Stapf* v. *United States,* 367 F. 2d 326 (C.A.D.C.), it was held that, where the maximum sentence had been imposed prior to the amendment so that it was clear that the sentencing judge had not given credit for the time in custody, the sentence should be revised to afford such credit. The court of appeals there ruled:

> "Wherever it is possible, as a matter of mechanical calculation, that credit could have been given, we will conclusively presume it was given * * *" [367 F. 2d at 330].

The record in the present case shows that the trial court considered the pre-sentence confinement as a factor in fixing the sentence imposed. During the pre-sentence proceedings, counsel for co-defendant Carbo, and petitioner's counsel, in asking for leniency, called the court's attention to the pre-sentence incarceration, "dead time" described as the equivalent of a one-year sentence (3 R. 8010, 8016). The court responded:

> "To allow in full for custody to date of the defendants Carbo, Palermo and Sica, one year has been deducted from the sentence now imposed in each instance * * * allowance has been made in this respect in the fixing of the term of confinement now to be specified" [3 R. 8043–8044; Pet. 3, 7].

The sentencing of petitioner then followed (3 R. 8045, 8047). That everyone at sentencing understood that allowance had been given for the pre-sentence confinement is clear from the fact that more than six years elapsed "without any outcry of innocence or injustice." *Pinedo* v. *United States,* 347 F. 2d 142, 146 (C.A. 9), certiorari denied, 382 U.S. 976. Because petitioner's sentences on separate counts were not made consecutive, he received less than the maximum sentence imposable. The trial court, as it indicated at trial and by its recent certification, considered the pre-sentence confinement as a factor in deciding to impose concurrent, rather than consecutive, sentences. See *Huber* v. *United States,* 390 F. 2d 544 (C.A. 5); *Aldridge* v. *United States,* 405 F. 2d 831 (C.A. 9); *Quarles* v. *United States,* No. 1128 Misc., this Term, certiorari denied, January 20, 1969.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
EDWARD FENIG,
Attorneys.

MAY 1969.

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